

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Improving Public Safety Communications in the 800 MHz Band |) | WT Docket No. 02-55 |
| |) | |
| |) | |
| Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels |) | |
| |) | |
| |) | |
| Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems |) | ET Docket No. 00-258 |
| |) | |

**OPPOSITION OF SPRINT NEXTEL CORPORATION
TO REQUEST FOR STAY**

Sprint Nextel Corporation ("Sprint Nextel") hereby urges the Commission to deny the Request for Stay filed in the above-captioned proceeding by Preferred Communications Systems, Inc. ("Preferred").¹ Preferred's request seeks a complete halt to the 800 MHz band reconfiguration process, yet it offers nothing more than recycled arguments previously rejected by the Commission along with a spectrum study that is fraught with methodological errors and erroneous conclusions. In addition, Preferred's claim that it will suffer imminent, irreparable harm is belied by the fact that it waited more than *fifteen months* after the release of the *800 MHz R&O*² to file its stay request.

¹ Request for Stay, Preferred Communications Systems, Inc., WT Docket No. 02-55 (Nov. 9, 2005) ("Preferred Request").

² *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*,

Preferred does not come close to demonstrating irreparable harm or a likelihood of success on the merits, and it therefore falls far short of meeting the Commission's requirements for a stay.

With this latest filing, Preferred continues its pattern of obstructionist tactics. Given these tactics and its track record as a licensee, Preferred should have little credibility in this proceeding. Despite being licensed in numerous states since 2000, Preferred has virtually no wireless operations. With the *possible* exception of Puerto Rico, Preferred has to date failed to use its licenses to provide *any* service to *any* customers. Rather than developing an actual business, it appears that Preferred's primary goal is to sell its 800 MHz Specialized Mobile Radio ("SMR") licenses on the secondary market for a lucrative price. This goal is reflected in its filings in this proceeding, which seek to "game" the Commission's processes to advance its own financial interests. Indeed, its stay request barely acknowledges the Commission's fundamental public policy objective: the resolution of interference to public safety communications at 800 MHz. The Commission should reject such tactics and deny Preferred's stay request, just as both the Commission and the U.S. Court of Appeals previously denied similar requests filed by other parties to stay 800 MHz band reconfiguration.³

Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004) ("*800 MHz R&O*").

³ *Improving Public Safety Communications in the 800 MHz Band*, Order, 20 FCC Rcd 641 (Pub. Safety & Critical Infrastructure Div. 2005) ("*MRA/Skitronics Order*"); *Mobile Relay Associates v. FCC*, No. 04-1413, 2005 U.S. App. LEXIS 1632 (D.C. Cir. Feb. 1, 2005) (per curiam).

I. PREFERRED FALLS FAR SHORT OF MEETING THE REQUIREMENTS FOR A STAY

In determining whether to grant a stay request, the Commission considers several key factors, including whether the petitioner has demonstrated that (1) it is likely to prevail on the merits, and (2) it will suffer irreparable harm if a stay is not granted.⁴ As described below, Preferred falls far short of satisfying these criteria.

A. Preferred Will Not Prevail on the Merits

The Commission has already considered and rejected Preferred's argument that the Commission's band reconfiguration orders are arbitrary because they treat Preferred differently than Sprint Nextel. As the Commission stated in denying the MRA/Skitronics stay request, the "actions the Commission has taken to abate interference to public safety and [critical infrastructure] licensees ... are fully within the Commission's authority and are amply supported by a comprehensive record."⁵ That record conclusively demonstrates the absurdity of Preferred suggesting that it is similarly situated to Sprint Nextel and thereby entitled to similar treatment in this proceeding. While Preferred has failed to construct a single facility or provide service to a single customer outside Puerto Rico, Sprint Nextel has invested billions of dollars in an 800/900 MHz high-density cellular network that offers millions of customers a broad range of nationwide and international wireless communications services. In addition, while Sprint Nextel is contributing billions of dollars in resources and spectrum rights to implement band reconfiguration,

⁴ *MRA/Skitronics Order*, ¶ 7. The Commission also considers whether issuance of a stay would substantially harm other parties, and whether grant of a stay is in the public interest. Both of these factors also weigh against granting a stay, although Preferred's failure to demonstrate a likelihood of success on the merits and irreparable harm alone warrants denial of its stay request.

⁵ *MRA/Skitronics Order*, ¶ 8.

Preferred is required to contribute nothing to this effort. Given these stark differences, the Commission has a sound public interest rationale for treating Sprint Nextel differently than licensees such as Preferred for purposes of 800 MHz reconfiguration.

In the *MRA/Skitronics Order*, the Commission rejected the same “retroactive rulemaking” argument Preferred makes in its stay request. The Commission stated that “[p]recedent makes clear that the 800 MHz R&O does not retroactively confiscate Movants’ spectrum, and that they have no ‘vested right’ to remain on what they regard as more lucrative spectrum.”⁶ The Commission’s band reconfiguration decision does not alter the past legal consequences of past actions. Although its new 800 MHz band plan may upset expectations based on prior rules, it is well settled that licensees “have no vested right to an unchanged regulatory framework.”⁷

The courts have emphasized that parties seeking a stay must make a “strong showing” that they will prevail on the merits.⁸ Preferred does not come close to carrying this burden.

B. Preferred Fails to Demonstrate Irreparable Harm

Preferred fails to show that it will suffer irreparable harm without a stay. Preferred’s sole claim of harm is that it will lose spectrum rights as a result of 800 MHz reconfiguration.⁹ The Commission rejected a similar argument in denying the

⁶ *MRA/Skitronics Order*, ¶ 10.

⁷ *Id.*

⁸ *Id.* ¶ 12.

⁹ See Preferred Request at 9-10.

MRA/Skitronics request,¹⁰ and its response to Preferred's recycling of this claim should be the same.

As the Commission found in the *MRA/Skitronics Order*, arguments regarding future lost spectrum value "ignore the steps taken by the Commission to prevent incumbents from being harmed by band reconfiguration."¹¹ Fundamentally, under the Commission's band reconfiguration orders, the Transition Administrator and ultimately the Commission itself are required to provide incumbent licensees with comparable replacement channels that afford them the same functionality and geographic coverage as their existing licenses.¹² The Commission has also given non-ESMR EA licensees such as Preferred the option of retuning their unencumbered EA white space spectrum to the ESMR band, provided they satisfy certain construction and other requirements.¹³

Preferred claims that there will be insufficient spectrum to implement band reconfiguration, and has submitted a spectrum study that purports to support this claim.¹⁴ This study, however, suffers serious methodological flaws. For example, the CTO Study's claim that Sprint Nextel has insufficient spectrum at 809-816/854-861 MHz to accommodate incumbents being retuned from the new NPSPAC block is based on

¹⁰ *MRA/Skitronics Order*, ¶ 14.

¹¹ *Id.*

¹² *Improving Public Safety Communications in the 800 MHz Band*, Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120, ¶ 77 (2004) ("Supplemental Order").

¹³ *Id.* ¶ 79.

¹⁴ See Letter from Paul Besozzi, Counsel to Preferred, to Marlene Dortch, Secretary, FCC (Oct. 17, 2005) (attaching "Analysis of the Impact of 800 MHz Rebanding," Concepts to Operations, Inc. (Oct. 10, 2005) ("CTO Study")). Preferred filed a revised version of this study on November 9, 2005. See Letter from Paul Besozzi, Counsel to Preferred, to Marlene Dortch, Secretary, FCC (Nov. 9, 2005).

erroneous channel calculations. The CTO Study substantially over-counts the number of non-Sprint Nextel-licensed channels that must either remain at 809-816/854-861 MHz or be retuned to that band segment, while substantially under-counting Sprint Nextel's spectrum.¹⁵ The CTO Study's site-based license counts for Boston and Miami – highlighted therein – are consequently quite misleading. As shown in Appendix A, in the Boston and Miami markets, the CTO Study over-counted the number of non-Sprint Nextel licenses in channels 1-120 by 100% or more, and in channels 121-400 by more than 50%. *Most dramatically, at channels 401 to 600, the CTO Study claims that non-Sprint Nextel licensees hold 120 site-based licenses in Boston and 79 in Miami. In fact, non-Sprint Nextel licensees do not hold a single license for channels 401-600 in these market areas.*

Preferred's allegations of a reconfiguration shortfall are also refuted by Sprint Nextel's September 21, 2004 filing, which provided a comprehensive, county-by-county breakdown of its 800 MHz spectrum holdings throughout the United States.¹⁶ That filing conclusively demonstrated that Sprint Nextel holds sufficient spectrum in the 809-816/854-861 MHz band segment to implement the Commission's 800 MHz reconfiguration plan; in fact, based thereon, the Commission substantially increased the

¹⁵ It appears that the CTO Study's authors misinterpreted discrepancies contained in the Commission's ULS database. Discrepancies in this database are not uncommon. For example, the ULS entries for a fair number of Sprint Nextel 800 MHz licenses contain information regarding non-Sprint Nextel entities in some data fields, perhaps because they have not been updated since Sprint Nextel acquired the license from such entities. The CTO Study apparently attributed to non-Sprint Nextel entities any license containing such discrepancies, even though *the FCC's licensing records are clear that Sprint Nextel or one of its subsidiaries is the actual licensee.*

¹⁶ See Letter from Regina Keeney, Counsel to Nextel Communications, Inc., to Marlene Dortch, Secretary, FCC (Sep. 21, 2004) (attaching "Updated Calculation of Nextel's Spectrum Contribution to 800 MHz Band Reconfiguration," Nextel Communications, Inc. (Sep. 21, 2004)).

dollar credit Sprint Nextel received for its 800 MHz spectral contributions to 800 MHz band reconfiguration.¹⁷

Preferred's spectrum shortfall allegations are further contradicted by real-world experience. The Transition Administrator has identified the specific channels at 809-816/854-861 MHz to which Wave 1 800 MHz incumbents can be retuned, both public safety and non-public safety licensees, and has conveyed that information to the affected incumbents.¹⁸ The Transition Administrator could not have made such target channel assignments if Preferred's channel shortfall allegations were accurate. Simply put, the CTO Study is flawed and inaccurate, and the Transition Administrator has found no channel shortfall in identifying retuning channels for affected incumbents.

The Commission found in the *MRA/Skitronics Order* that the same arguments Preferred now makes regarding lost spectrum rights are "speculative contentions" that are "wholly insufficient to support a claim of certain and irreparable harm."¹⁹ This is especially the case for Preferred given that, with few if any existing customers, there is very little potential for disruption to its "business." Even assuming Preferred prevails on appeal (an unrealistic assumption, as explained above), the Commission will be in

¹⁷ *Supplemental Order*, ¶ 36.

¹⁸ See, e.g., "Frequency Proposal Report Fact Sheet," 800 MHz Transition Administrator (available at <<http://www.800ta.org/content/800mhz/frequency.asp>>).

¹⁹ *MRA/Skitronics Order*, ¶ 14. Preferred also claims that the "manner of implementing the rebanding process" will be hampered by the fact that Preferred has not yet been able to obtain sufficiently accurate data from the FCC concerning the originally licensed contours of incumbent licensees in Preferred's EAs. *Request for Stay* at 7; see also *id.* at 7-8, 10. As Preferred itself appears to acknowledge, however, this problem relates solely to the process of "implementing" the rebanding plan – a problem that (as Preferred also admits) is "separate and apart from" the irreparable harm that Preferred alleges would occur absent a stay. *Id.* at 7. Accordingly, this issue has no bearing on the merits of Preferred's stay request.

position to remedy any theoretical harm Preferred may suffer even without the grant of a stay.

Rather than protecting an actual subscribership, Preferred's real concern appears to be that, after band reconfiguration, Sprint Nextel will not have sufficient incentive to purchase its EA licenses on the secondary market. This "greenmail" objective obviously has nothing to do with solving the CMRS – public safety interference problem in the 800 MHz band. As the Commission has stated, "[a]ltering the distribution of profits among private parties is not, and never has been, a proper or desirable function of the Commission."²⁰ The Commission should reject Preferred's continuing effort to place its own financial condition above the Commission's public interest goals.

²⁰ *Evaluation of the Syndication and Financial Interest Rules*, Second Report and Order, 8 FCC Rcd 3282, ¶ 42 (1993).

II. CONCLUSION

For the aforementioned reasons, the Commission should expeditiously deny Preferred's request for stay.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

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APPENDIX A

| Sprint Nextel Analysis | | | | | | |
|------------------------|--|--|--|--|--|--|
| City | Non-Sprint Nextel 1 to 120 w/i 35 miles | Non-Sprint Nextel 121 to 400 w/i 35 miles | Non-Sprint Nextel 401 to 600 w/i 35 miles | Sprint Nextel 1 to 120 w/i 35 miles | Sprint Nextel 121 to 400 w/i 35 miles | Sprint Nextel 401 to 600 w/i 35 miles |
| Boston | 20 | 127 | 0 | 103 | 136 | 200 |
| Miami | 40 | 132 | 0 | 87 | 146 | 200 |
| | | | | | | |
| CTO Analysis | | | | | | |
| City | Non-Sprint Nextel 1 to 120 w/i 35 miles | Non-Sprint Nextel 121 to 400 w/i 35 miles | Non-Sprint Nextel 401 to 600 w/i 35 miles | Sprint Nextel 1 to 120 w/i 35 miles | Sprint Nextel 121 to 400 w/i 35 miles | Sprint Nextel 401 to 600 w/i 35 miles |
| Boston | 73 | 206 | 120 | Not provided | 138 | Not provided |
| Miami | 80 | 227 | 79 | Not provided | 150 | Not provided |

CERTIFICATE OF SERVICE

I, Claudia Del Casino, do hereby certify that on this 16th day of November, 2005, a copy of the foregoing Opposition of Sprint Nextel Corporation to Request for Stay was delivered by first-class, postage-prepaid mail, unless otherwise indicated, to the following parties:

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